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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable PHYLLIS J. HAMILTON, Judge

"AMY," ET AL.,)
Plaintiffs,) No. C-19-2184 PJH
vs.) Thursday, February 25, 2021
RANDALL STEVEN CURTIS,) Oakland, California
Defendant.) MOTION FOR SUMMARY JUDGMENT

REPORTER'S TRANSCRIPT OF ZOOM PROCEEDINGS

APPEARANCES:

For Plaintiffs: CARPENTER ZUCKERMAN & ROWLEY
407 Bryant Circle, Suite F
Ojai, California 93023
BY: JOHN A. KAWAI, ESQUIRE

CAROL L. HEPBURN, ESQUIRE
P.O. Box 17718
Seattle, Washington 98127

For Defendant: COLEMAN & BALOGH LLP
235 Montgomery Street, Suite 1070
San Francisco, California 94104
BY: ETHAN A. BALOGH, ESQUIRE

Reported By: Diane E. Skillman, CSR 4909, RPR, FCRR
Official Court Reporter

TRANSCRIPT PRODUCED BY COMPUTER-AIDED TRANSCRIPTION

1 Thursday, February 25, 2021

2 :05 p.m.

2 P R O C E E D I N G S

3 oo

4 **THE CLERK:** Calling Civil case 19-2184 PJH, Amy, et
5 al. versus Curtis.

6 Counsel in this case, please raise your hand.

7 **MR. KAWAI:** Good afternoon, Your Honor. John Kawai
8 for plaintiffs.

9 **THE COURT:** Good afternoon.

10 **MR. KAWAI:** Carol, you are muted.

11 **MS. HEPBURN:** Sorry. Good afternoon, Your Honor.
12 Carol Hepburn for plaintiffs.

13 **THE COURT:** Good afternoon.

14 **THE CLERK:** Mr. Balogh, can you please start your
15 video?

16 **MR. BALOGH:** I am trying to do that now.

17 Good afternoon, Your Honor. Ethan Balogh. At least I'm
18 not a cat. Let me see if I can figure out how to fix this.
19 I'm having some trouble. Pardon me for a second.

20 (Pause in the proceedings.)

21 **THE COURT:** There should be a little camera on the
22 bottom left --

23 **MR. BALOGH:** Got it. Thank you, Your Honor. Thank
24 you very much.

25 **THE COURT:** Okay.

1 **MR. BALOGH:** Good afternoon, again. Ethan Balogh on
2 behalf of defendant Randall Curtis.

3 **THE COURT:** All right. Good afternoon.

4 All right. I only have until 3:00 o'clock so -- so I
5 would like us to focus on the issues that I need to decide.

6 You inundated me with paper. I'm not sure what to make of
7 all of this paper, and I don't really understand the
8 plaintiffs' filings. I have a hard time navigating our own
9 dockets just trying to find everything.

10 But it appears that most of what I am looking for is in
11 Docket 139-4. I think that's where most of the evidentiary
12 support is.

13 We have two motions pending: Motion for Summary Judgment
14 filed by plaintiffs and a Motion for Judgment on the Pleadings
15 filed by the defendant. Let's start first with the Motion for
16 Summary Judgment.

17 Putting aside the evidentiary objections that Mr. Balogh
18 has raised -- I'll let him spend his time on those if he
19 wishes to do that -- but with regard to my questions of
20 plaintiffs on your motion, it's not entirely clear to me what
21 you all think needs to be proven in this case. To me, it
22 looks -- it's fairly straightforward, but I have all these
23 various different lists and different showings, and I'm just
24 not entirely clear what you think needs to be shown.

25 I think what needs to be shown in this case, under the

1 statute, it's under the statute, you've got a predicate
2 violation of 2242, which Mr. Curtis entered a plea of guilty
3 to and which gives rise to this claim, and the person has
4 to -- the plaintiff has to show that they were a victim of a
5 violation of one of these sections. And the section is 2242
6 in this case, and that seems to me to be -- particularly since
7 the damages question has been taken out of the case by the
8 amendment of the complaint and the withdrawal of the request
9 for punitive damages. Seems as though the plaintiffs have
10 elected to stand on just the liquidated damages which are
11 afforded by the statute. So without the damages portion in
12 the case, the question is whether or not the person, while a
13 minor, was a victim.

14 Okay? That has a component of identity whether or not
15 we're talking about child pornography, right?

16 **MS. HEPBURN:** Yes.

17 **THE COURT:** What you need to establish is that each
18 of the 15 plaintiffs was a victim of this child sexual abuse
19 which gave rise to, which enabled the manufacturer of the
20 pornography, pornographic images, still or video, right? That
21 those images, because this is a possession and transportation
22 that Mr. Curtis pled guilty to, that those images were on his
23 computer. Okay?

24 Now, I don't understand a lot of how you all have, in the
25 chart that you provided in the reply brief to the Motion for

1 Summary Judgment, I am just not exactly sure how I come to
2 that determination because as part of that calculus, the image
3 itself has to fit within the definition of child pornography.

4 **MS. HEPBURN:** Yes.

5 **THE COURT:** Which doesn't necessarily mean sexual
6 activity. It has to be pornographic in nature.

7 **MS. HEPBURN:** Yes.

8 **THE COURT:** Okay?

9 So it has to be the plaintiffs in a pornographic image
10 that's found on the defendant's computer.

11 **MS. HEPBURN:** Yes.

12 **THE COURT:** That's it. Okay.

13 So, this -- the expert that you use, Mr. Laws, I'm not
14 exactly sure what he did, so I need a further explanation.

15 **MS. HEPBURN:** Sure, Your Honor.

16 **THE COURT:** Is -- his job was not to identify the
17 plaintiffs. There's all this discussion about who he knew, he
18 can look at the picture and tell that's them as an adult.
19 That's not his job.

20 As far as I can tell, his job was to conduct a forensic
21 analysis and to determine if certain series, which all have
22 names, were on the defendant's computer.

23 My question is, does the existence of the series on
24 Mr. Curtis' computer necessarily require the conclusion that
25 the individual plaintiffs' images were on the computer?

1 Are they -- is it synonymous with having the plaintiffs'
2 image if the series is on the computer? I mean, you've got 15
3 plaintiffs. That's 15 images on one computer.

4 Why is it so -- it should not be difficult to establish if
5 there are -- if there's one image of each of these plaintiffs
6 that's pornographic in nature on Mr. Curtis' computer.

7 I have seen a number of these series previously in person.
8 I mean, I handle child pornography cases on my criminal
9 docket. I am familiar with some of these. I mean, once you
10 have seen them, you don't really forget them. So I know
11 that -- but I have no idea if I've actually seen any of these
12 particular plaintiffs.

13 So how do you prove -- how are you expecting to prove
14 this? What in this very, very dense record will point me to
15 exactly what I need, which is, an image for each plaintiff
16 that's pornographic in nature and was found on the defendant's
17 computer?

18 **MS. HEPBURN:** Your Honor has mentioned the chart that
19 we put in the reply brief, and that is the shortcut to this.
20 And we believe that we have submitted more than Your Honor
21 needs.

22 I certainly agree with the elements that you've set forth
23 there. And a number of the difficulties and perhaps the
24 reason that we have overdone it, if we have in this case, is
25 because of the constraints of dealing with contraband. And

1 also because, Your Honor, this is the first case in the
2 country, I do believe, in which we have brought to court --
3 anyone has brought to court, plaintiffs who have exercised
4 their right under the new statute 18 U.S.C. 3509(m) (3) that
5 was passed December of 2018 which provided victims the
6 opportunity to view their own images or to send in a
7 representative to view their own images in a criminal case.

8 This has never been done before. Agent -- Retired Agent
9 Laws did allude to that in his reply declaration when he said
10 we had to go to Homeland Security and develop a protocol
11 because they weren't just going to turn over the evidence in
12 the case to me.

13 So the link that we have is the case agent, Agent Jason
14 Popper, has provided under that statutory procedure the clone
15 of the materials taken from Mr. Curtis. There were several
16 USB drives. These are all listed in the criminal
17 investigation report that Mr. Curtis' lawyers got during the
18 criminal case discovery and which was then produced by
19 Mr. Curtis to us in our civil discovery, and this correlates
20 with the identification of the materials which were provided
21 by Agent Popper to retired Agent Laws.

22 And Retired Agent Laws, then using law enforcement grade
23 software, looked at these materials on a dedicated forensic
24 laptop and found himself, via hash value and identifying file
25 names, the images of a number of these series; not all of

1 them. And despite all the sermon drama about whether Agent
2 Laws is -- Retired Agent Laws is credible, I would submit that
3 the fact that he didn't say I found each and every image is an
4 indicia of credibility, Your Honor.

5 But he did that. And then he also got after that
6 evidence, review sanitized images because, of course, we can't
7 have the unredacted images. And we showed those to our
8 clients who were up for looking at them. Because remember,
9 this is an injurious process. And they have provided to Your
10 Honor their own identification of themselves saying, yes, I
11 was sexually abused. I was -- I understand my images are
12 labeled as the "Vicky Series," the "Lighthouse One Series," or
13 whatever, and that's me in that picture. So that's another
14 level of proof we provided you.

15 We've also provided the Court with the declarations of the
16 law enforcement points of contact. Now, these are the men and
17 women in law enforcement who were largely among those teams
18 that rescued these kids when they were still being abused and
19 they met the children. Some of them have kept in touch with
20 them. They have, since that time, been called upon multiple
21 times to testify in courts of law identifying the image,
22 testifying to the name and the birthdate. Certainly some of
23 these have come before Your Honor in trials on child
24 pornography cases.

25 We showed the redacted images to those points of contact,

1 and as you indicated, once you've seen these images, you don't
2 forget them. And they identified the images, they identified
3 the plaintiffs. They testified to the sexual content which
4 goes to the other element Your Honor mentioned we need, which
5 we certainly acknowledge, that there must be a pornographic
6 content to this, and our chart speaks to that.

7 We don't --

8 **THE COURT:** There are two that don't, Jessica --

9 **MS. HEPBURN:** Yes.

10 **THE COURT:** -- doesn't speak to that.

11 **MS. HEPBURN:** Yes, Your Honor. And also I think
12 Erika and Tori is in doubt as well.

13 **THE COURT:** Right. So there are two for -- that
14 particular element is missing in what you've given me.

15 **MS. HEPBURN:** And so we ask the Court to allow us to
16 subpoena Case Agent Popper to bring those images to the Court.
17 Certainly we know we don't have a right to live testimony on a
18 motion without Your Honor allowing that, but, again, the
19 constraints of dealing with a case that involves contraband
20 require us to make do as best we can and to ask the Court if
21 we can take this extra step to have the case agent bring the
22 images to Court so Your Honor can unfortunately look at them
23 and see the genitals in the picture and determine that what is
24 depicted is, in fact, pornographic.

25 **THE COURT:** I would consider that.

MS. HEPBURN: Because none of these plaintiffs have control or the ability to make that element in each and every circumstance. And these are innocent young women, and they should not be deprived of the opportunity to make that element.

You have abundant evidence of identification, I would submit, and so then with the additional element of sexual activity, we should be shown to have brought to the Court enough to make the summary judgment.

I can speak a little bit to some of the particular issues that Mr. Balogh raises if Your Honor wishes.

THE COURT: We have time.

MS . HEPBURN: Okay .

I think all of his complaints about lack of disclosure or timely disclosure are really a false flag because he can't -- he has no defense to the substance of a plaintiff or a parent coming in and saying, yes, that is me in that redacted image, that's my child.

And we had provided Your Honor with yet another chart in the Exhibit 5 to the declaration of my paralegal, Michelle Sparks, which gives you chapter and verse on the production of all of the documentation that we provided, which is quite ample and which provides a lot of this contact information, the identification, includes law enforcement points of contact.

1 I would note that defendant himself listed a number of
2 the -- listed all the plaintiffs and the parents in his own
3 initial disclosure, and I would say that this case has had a
4 bit different posture with the discovery issues brought up.
5 And I would point out that within two days of this Court's
6 order on October 26th, 2020, which narrowed down the discovery
7 issues and framed more precisely the issues, we submitted a
8 supplemental initial disclosure which provided all of the
9 information which had previously been provided in a different
10 form, but then set it forth in the initial disclosure.

11 I would also note that defendant complains in this setting
12 of discovery issues. And these are issues for which he did
13 not largely ask for a meet and confer, did not bring to the
14 Court to request some help. We haven't had an opportunity to
15 work anything out in terms of a remedy. There's been no
16 request for the depositions of the law enforcement points of
17 contact. The last ditch written discovery which defendant did
18 serve us with was about getting correspondence or documents
19 exchanged with Congress about amendment of the statute. So
20 that was the issue he was pursuing, not the issues that he
21 complains about today.

22 We have cited to the Court the *Liaw* -- if I am pronouncing
23 that right, spelled L-I-A-W, case out of the Northern District
24 and also *IBM versus Fasco* which make clear that the very
25 drastic remedy of striking testimony is the last ditch thing

1 that should be considered. And there are many other things
2 which might be considered before that as a remedy to a
3 situation. Which, again, we haven't had a chance to work with
4 defendant and try and figure something out.

5 In particular, defendant complains about the law
6 enforcement points of contact. He claims falsely that we
7 didn't include them in our expert disclosure. We did, in
8 fact, and we provided that to Court. A copy of our expert
9 disclosure and exhibit to the declaration of Michelle Sparks,
10 the paralegal, shows that we did disclose the law enforcement
11 points of contact as experts.

12 We did that out of an abundance of caution because, just
13 like you might disclose a treating physician in a case,
14 because they are a doctor, they might get asked a medical
15 question at the time of trial. You never know, but, you know,
16 the points of contact are really testifying based upon their
17 observations and personal experience, rescuing the children,
18 knowing the children, seeing the images, testifying in the
19 intervening years about the images; therefore, the images are
20 in their memory so they can identify them for the Court here
21 today.

22 And then some have kept in touch with the victims and have
23 seen them grow up, and have that basis for identification as
24 well. And they all speak to their name and dates of birth,
25 Your Honor.

1 That is the gist of my presentation. I would also point
2 the Court in terms of the hearsay objections of counsel to
3 Federal Rule of Evidence 807 which talks about the elements of
4 what are the reasonable efforts of the proponent of the
5 evidence and what are the indicia of reliability in this
6 situation.

7 One of the things that defendant complains about is
8 Mr. Laws' reliance upon the assertion of Case Agent Popper
9 that these are images that came from Mr. Curtis' computer.
10 Well, the indicia of reliability is that we have gone through
11 a statutory procedure. We worked out a protocol with Homeland
12 Security. Agent Popper is the case agent as shown in the
13 criminal report, and the file references of the media are the
14 same, the SanDisk Cruzer, the Transcend USB Drive, these are
15 all the same.

16 And, really, this is the most reasonable effort that
17 plaintiffs could do in this regard when they cannot possess
18 the evidence. When we have a case where counsel can't possess
19 a photograph of the evidence, can't show a witness the
20 evidence, I can't call the agents and say, hey, bring that
21 over to my office and let's work with it.

22 So given the contraband nature of the case, not only is
23 this the most reasonable effort that plaintiffs could make,
24 it's really the only effort that they could make to deal with
25 the contraband.

1 So in light of that, I think the evidence that we provided
2 the Court -- perhaps it's too much. I'm sorry, but, again, we
3 didn't have a template for how to present this to the Court.
4 We do believe it's sufficient.

5 Thank you.

6 **THE COURT:** The defendant, though, argues that there
7 is a lack of contraband confirmed on the defendant's computer
8 for 9 of the 15 plaintiffs.

9 **MS. HEPBURN:** He is saying that Agent -- Retired
10 Agent Laws did not identify those, but for those victims, we
11 have the identification through the redacted images by the
12 plaintiffs themselves, by the parents, by the law enforcement
13 POCs. So that number refers to Agent Laws' -- Retired Agent
14 Laws' testimony, Your Honor.

15 **THE COURT:** Okay. All right.

16 Mr. Balogh.

17 **MR. BALOGH:** Good afternoon, Your Honor.

18 I'll start with the last point because it's just
19 incorrect. The way to get the testimony would have been to
20 subpoena on Agent Popper, supply a letter pursuant to
21 regulations setting forth the bases of the need for law
22 enforcement testimony, cite to 3509 and the need for law
23 enforcement testimony. Have him attend a deposition. Take an
24 oath. Prepare -- answer questions, identify the information
25 they want to later rely on, subject him to cross-examination,

1 and then you have prior testimony which is not subject to the
2 hearsay rule at this stage of the proceedings. And they could
3 have relied on that to prove their case. Instead they did
4 something different.

5 And the second part of that answer, I will add, is they
6 suggest it was a timing problem. And they cite that the
7 Statute 3509 was amended in 12/18. Before that time they
8 already raised claims against Mr. Curtis without reviewing any
9 of the documents, without doing any pretrial investigation.
10 They have letters in there they claim each of them is owed
11 this money.

12 And when they disclosed Agent Popper in April of '19 --
13 excuse me, Agent Laws, Retired Agent Laws in April of '19, he
14 waited almost a year before he had his first contact with HSI.
15 So any delay is on them by how they decided to proceed in the
16 case.

17 Let me go back to the beginning now and further clarify
18 that, because that's how you prove this case. And I think a
19 big part of this case is based on two things: One is an
20 education. Fortunately enough for plaintiffs, because as you
21 know, in every other case, the defendant in a criminal --
22 preceding criminal prosecution, usually stipulates to
23 restitution and agrees that the claimants, some who are
24 plaintiffs were, in fact, victims.

25 This is the only case of all the cases that these

1 plaintiffs have brought where that was not the case. And the
2 reasons are rather obvious. They sent a threatening letter to
3 Mr. Curtis before the restitution stage in the criminal case,
4 and that resulted in a stipulation where the proof that they
5 needed was not given in the case, the need to obtain here;
6 they delayed in that.

7 Let me go to your first question. The first thing you
8 asked her, Your Honor, is if a series is on his computer, does
9 that answer the question. And the answer is no.

10 Series are comprised of multiple images. Any they all
11 have varying numbers. Some of them are pornographic, others
12 are not pornographic. And Mr. Laws testifies to this at his
13 deposition. He found one picture where he determined it
14 wasn't a pornographic picture. I think that's Sally who you
15 were mentioning.

16 So possession of a photograph doesn't mean possession of
17 child pornography. And Mr. Curtis is alleged to have had a
18 subset of certain series. Not the entire series, not every
19 piece. It's whatever he downloaded and maintained on his
20 computer. Some of those may be child porn. Some of them
21 certainly are child porn. Not necessarily of these
22 plaintiffs, but they supported the conviction because he plead
23 guilty to possessing and transporting child pornography.

24 But having a name series picture with nothing more doesn't
25 answer the question.

1 The second point I'll make is, I respect and disagree with
2 you, as Mr. Laws testified, the plaintiffs told him his job
3 was to identify the plaintiffs. And before he contacted HSI
4 to arrange for a view, the first pass while he delayed that
5 task was to travel throughout America and to meet the
6 individual plaintiffs. He went to Canada to get photographs
7 of them, and to try to obtain their identity. That's what he
8 testified his retained expertise was for and that's what they
9 disclosed him as an expert for in part.

10 What he also testified to, as my colleague just conceded,
11 is that for nine of these plaintiffs, he could not locate any
12 images of them on Mr. Curtis' media. Full stop. And that's
13 what's going to cause the late disclosure later because they
14 didn't anticipate that he would fail in what they thought he
15 would be able to achieve. So for those nine, he wasn't able
16 to identify that he had any images on there.

17 That relates to the nature of the identification
18 testimony. His expertise is as a lay witness. And under
19 *Gadson*, he is not allowed to testify based on hearsay. He
20 can't testify that Popper told me these images were located in
21 a certain place. That's not permitted by black letter Ninth
22 Circuit law which the Court is obligated to enforce.

23 One of the things Ms. Hepburn said is he found the hash
24 values. That's not completely accurate. His testimony at
25 deposition, and as Your Honor knows, we submitted the entire

1 deposition, is that he created his own hash values over time
2 to help identify plaintiffs in this case. But those weren't
3 confirming hash values, that's him proposing that these hash
4 values were matched. But even then, he says he found six
5 plaintiffs on there and he contended that all six were child
6 pornography.

7 With respect to two of them, we have shown you -- and this
8 is a good example that one of them, I believe it's Sally, we
9 have the picture for you. I can give you the page number.
10 She's -- it's not a pornographic image. It's a child in a
11 tub. This picture may be shown, the sanitized version, as
12 Laws' declaration -- the citation is, Laws' declaration
13 Exhibit 58. That's contained in my -- in the declaration I
14 filed.

15 And the picture of Violet, there's another picture of
16 Violet where it's a closer call, but she's dressed. And it is
17 unclear whether it meets the statutory definition of engaging
18 in sexually explicit conduct, and sexually explicit conduct
19 that has a specific definition, and that's 18 U.S.C.
20 2256 (2) (B) (8) (A).

21 So even for those six, two of them are in question, but
22 then for the other nine, he didn't locate them anywhere. When
23 you get back to his declaration -- actually I should go there
24 now.

25 The most important part of his declaration is

1 paragraph 11, Your Honor, when he couldn't find the nine
2 girls -- now most of them are women, adults. He -- they set
3 out to do this work around. And I will read the declaration
4 because I think there's follow-up questions for plaintiffs
5 because I think it misleads.

6 First sentence. "As part of my work on this matter, and
7 after my time -- after the time of my review of the evidence
8 in July 2020, HSI Group Supervisor Christina Barfuss emailed
9 me a series of heavily redacted images. The file names on the
10 redacted images correspond to a number, but not all, of those
11 images viewed by me in the course of my evidence review in
12 that matter."

13 So it's intentionally vague. What it means is, how it was
14 named by Barfuss matches some of the files, images he read.
15 No more, no less.

16 The next sentence. "The file names of the redacted photos
17 correspond as well to file names listed in the NCMEC report
18 for the various sets."

19 Again, intentionally vague. It doesn't establish that
20 each of these images were on his computer. Mr. Barfuss isn't
21 claiming that, and it doesn't allege that each of these images
22 contains child pornography.

23 The last sentence: "These redacted images depict all
24 victim (sic) discovered on the seized digital media from
25 Curtis and related to my examination."

1 Again, it's saying -- first of all, the foundation of how
2 it depicts all victims when he's testified under oath and the
3 reports say under oath that he couldn't identify 9 of the 15.
4 So it appears that he's -- he was citing Barfuss' claim but
5 even that is unclear and doesn't establish that these images
6 are child pornography and these images are child pornography
7 of the plaintiffs in this case.

8 The last part is he describes the folders they were sorted
9 into and each folder contained at least one redacted image
10 from the respective child exploitation series. Again, it
11 doesn't establish that those were from his computer or they
12 were child pornography, and then he lists the series.

13 So, respectfully, that's all the dodge that's designed to
14 avoid addressing clearly, which they should have done in their
15 Motion for Summary Judgment, of he didn't find 9 of the 15.
16 If you want to talk about credibility and candor with the
17 Court, you address it forthright and say here's the problem
18 and here's how we developed evidence to prove otherwise. They
19 didn't do that.

20 And a closer review of Paragraph 11, key paragraph, shows
21 he cannot establish and does not establish sufficient to
22 require summary judgment at this stage. And he hasn't -- he
23 hasn't made all the predicate facts there such that they can
24 be accepted by the Court.

25 The next thing I want to talk about, if I may, Your Honor,

1 is I think plaintiffs' counsel doesn't understand our
2 objections. This case is not -- we are not asking for
3 terminating sanctions, we are not asking for sanctions at all.

4 Rule 37(c)(1), Federal Rules of Civil Procedure, is
5 required to be enforced under *Yetti by Molly and Hoffman*. And
6 that case says, if you don't timely disclose witnesses and
7 evidence you're going to use to let your opponent develop his
8 or her discovery plan they're barred from any motion for any
9 trial. Full stop.

10 These aren't terminating sanctions at all. What
11 Ms. Hepburn has said, we made these disclosures two days after
12 we got your order. But that's not the -- more important, it
13 was the day before the discovery deadline. There was no way
14 on God's green earth that receiving this list of 32
15 witnesses -- they even buried the POCs in there, they only
16 relied on six of them, they disclosed 32; that I could have a
17 discovery plan in response to it.

18 It is not my responsibility to ask for an extension of
19 time. It was not my responsibility to ask for a revised
20 schedule. The Court had revised the schedule once. And I
21 believe this Court's comment at the Case Management Conference
22 was, it wouldn't reset trial dates except for extraordinarily
23 good cause. That wasn't my job. They were worried about my
24 objection or Rule 37, which is clear on its face. They could
25 have said, we just got this discovery order, we want to change

1 the order.

2 They were perhaps hopeful that I wouldn't raise the
3 objections I've raised, but these aren't terminating
4 sanctions, and the cases they cite about sanctions are
5 inapposite. This is straight forward application of
6 Rule 37(c)(1) which *Yeti by Molly* and *Hoffman* and the Ninth
7 Circuit say are enforced strictly self-executing rules that
8 are designed to do this.

9 At the end of discovery, after I've spent my money on the
10 case and developed my case, I was informed of 32 witnesses and
11 a host of documents that the plaintiffs think I should have
12 been able to have -- issue more discovery and issue on.

13 One thing they've said, and I will quote this to you, in
14 the discovery motion, which we did file, it's pending before
15 your Court -- which are pending before this Court, the
16 Magistrate Judge declined to give effect to their waiver by
17 failing to respond timely. They just ignored it. So we
18 contend it's a waiver.

19 Equally important is plaintiffs' argument, and this is
20 Document 160 at page 4 where they argue that you can't serve
21 discovery that is not going to be -- if the answer doesn't
22 come due before the discovery deadline.

23 And so by their -- forgetting their waiver, their position
24 in this case is, even though they served this discovery
25 October 28th, the Ninth Circuit case law says I could not have

1 filed interrogatories for that, I could not have sought
2 depositions for that. I can do nothing. This is their
3 argument.

4 **THE COURT:** Mr. Balogh, I think the rule is you can't
5 propound discovery. You can't -- without there being
6 sufficient time, you cannot, for instance, serve a set of
7 interrogatories for which an opposing party gets 30 days to
8 respond if you do so in fewer than 30 days before the close of
9 discovery.

10 I don't think there's a corresponding timeline on
11 supplementing your disclosures.

12 **MR. BALOGH:** The rule says -- I've said that. You're
13 making my point for Your Honor.

14 The day before discovery closed, they served me notice of
15 32 new witnesses and identified new document (sic). I could
16 not, in that 24-hour period, when the next day I had a Ninth
17 Circuit brief due, and under the case law you just cited to
18 me, I couldn't do anything about those 32 witnesses. It was
19 too late. The barn door had closed.

20 **THE COURT:** Did you not serve discovery at the end of
21 discovery as well?

22 **MR. BALOGH:** I did, and they didn't respond.

23 **THE COURT:** Okay. So you are both in the same
24 position. You didn't --

25 **MR. BALOGH:** No, we are not in the same -- because

1 I'm not -- this motion is about Rule 37. And Rule 37 says if
2 you don't timely disclose witnesses or exhibits, you cannot
3 rely on any of those witnesses or any of those exhibits at any
4 motion --

5 **THE COURT:** How are you contesting that Rule 37
6 describes timely disclosures? They have an ongoing duty to
7 supplement any prior disclosures up to the time of trial.
8 They are required to disclose whenever it becomes unknown to
9 them.

10 So what are you -- where is the rule that defines that
11 their disclosures were untimely?

12 **MR. BALOGH:** Well, just what you said. The point of
13 the disclosures is timely so the opposing party may conduct
14 discovery with respect to those disclosures. And disclosing
15 something --

16 **THE COURT:** That doesn't -- that's not the rule.

17 **MR. BALOGH:** I would --

18 **THE COURT:** That is not the rule. That's not the
19 rule. The rule I was talking about is for -- is for
20 discovery -- that rule applies to discovery requests.

21 **MR. BALOGH:** Right. I understand that.

22 My point is, if you served -- if you give notice of
23 witnesses and documents at a time I can't depose them, seek
24 the documents, or propose interrogatories, that is not timely.
25 I can't do anything about them in the disclosures. I've been

1 blocked out.

2 **THE COURT:** Okay. Okay. I understand your argument
3 now.

4 You should move on. You don't have much time left.

5 **MR. BALOGH:** That's -- I respectfully suggest the
6 Court read *Hoffman* -- *Yeti by Molly* and *Hoffman* which say
7 exactly what I'm saying. They would have to come back and
8 show substantial justification for their late disclosures, and
9 no prejudice to the defense. And the fact that I could not --

10 **THE COURT:** What's the -- what is the section of
11 Rule 37 that you are relying on?

12 **MR. BALOGH:** Federal Rule of Civil Procedure
13 37(c)(1).

14 **THE COURT:** (c)(1)? Okay. I'll take a look at that.
15 Go ahead.

16 **MR. BALOGH:** And then the last thing I'll say,
17 obviously I respectfully -- I think the Court's answer says,
18 the damages question was resolved, and I don't think that's
19 true. They are trying to enforce the statute that's not
20 retroactive.

21 So the statute that applies to Mr. Curtis is a statute
22 that was in effect at the time of his conduct, and that
23 statute requires a showing of actual damages under *Chao v.*
24 *Doe* -- excuse me, *Doe v. Chao*. That's a Supreme Court case
25 which was then followed up by *FAA v. Hoffman*, another Supreme

1 Court case that says exactly that.

2 And because the statute is not retroactive, they can't
3 apply the new statute to us. This Court previously addressed
4 the personal injury prong of the statute, but no one has
5 briefed the actual damages prong until this point. And they
6 have to prove actual damages under *Doe v. Chao*. And by
7 failing to plead them before we get to my motion, that's a
8 problem for them.

9 I want to talk -- let me take one look. I think that
10 might be my responses to them. I -- the last thing I will say
11 is, they say that -- they disclose the POC witnesses as
12 experts. I guess my objection wasn't clear enough.

13 That's true, when they amended the statute, amended their
14 disclosures, before they gave that information, they were
15 potential experts, but then there was an expert disclosure
16 date of November 30th to produce expert reports whereby the
17 parties would actually identify and provide the reports for
18 expert discovery.

19 Every expert that was disclosed and report served was
20 deposed by the other side. None of these persons was
21 disclosed in that way. We didn't get expert reports from any
22 of them. So we -- that showed us that these were not experts
23 for trial because they weren't -- they didn't produce expert
24 reports.

25 So it is, again, incorrect to suggest I had a duty to

1 depose as experts persons for whom they did not provide expert
2 reports. By deciding not to provide expert reports, they
3 signaled to the defense we will not be using them as experts
4 at trial. But once they didn't do that, they cannot smuggle
5 in lay opinion testimony and they can't have witnesses based
6 on hearsay because hearsay is barred.

7 They complained that at Summary Judgment I'm objecting to
8 evidence to avoid a finding of Summary Judgment, and that's
9 exactly what the rules contemplate a lawyer is supposed to do.
10 To obtain Summary Judgment, they have to offer evidence in
11 conformity with the rules of evidence. And a failure to do
12 so, relying on hearsay -- their entire case is based on Popper
13 said this, and later they told you, in fact, it's Barfuss said
14 some of it, and we have never had an opportunity to confront
15 those witnesses.

16 If -- definition of "hearsay," it's out-of-court
17 statements for the truth of the matter asserted being relied
18 on by lay witnesses to support a conclusion, and 801 says
19 that's a no go.

20 Again, I started my conversation by showing how clearly
21 this was a very easy case to present. It required a subpoena
22 on the agent and a letter pursuant to *Touhy*, and that's what
23 they should have done. At this late stage of the day, by
24 failing to do their job to obtain Summary Judgment, all that
25 means is, we get a trial, which is the standard. This is the

1 exception to the rule.

2 If you've done such a great job that your presentation of
3 evidence is unimpeachable and pursuant to rules of evidence
4 that it establishes your absolute right to judgment such that
5 no jury need be called, then you can get this bonus. But the
6 failure to do that, all that means is, they get to have a
7 trial where they prove their case. And Mr. Curtis asks for
8 that trial.

9 That is my complete response to their motion for Summary
10 Judgment.

11 **THE COURT:** All right. Thank you.

12 We just have a few more minutes. Did you wish to respond,
13 Ms. Hepburn?

14 **MS. HEPBURN:** Only to say that there were no reports
15 from the POCs. We can't get a report from an active agent,
16 and the -- Agent Popper was disclosed in the very initial
17 disclosures which were done in 2019.

18 That's all I would say, Your Honor.

19 **THE COURT:** Okay.

20 I'm having some difficulty here. I don't agree that
21 Mr. Balogh's characterization as to how you should plead your
22 case is, indeed, the only way you can plead your case. That's
23 his view as to how you can plead your case. I might have a
24 difficult view than that.

25 The difficulty I'm having is that there are the identity

1 issues --

2 **MS. HEPBURN:** Yes.

3 **THE COURT:** There are the sexual conduct issues.

4 **MS. HEPBURN:** Yes.

5 **THE COURT:** There are the -- whether or not it
6 resides on the defendant's computer.

7 **MS. HEPBURN:** Yes.

8 **THE COURT:** All right? I've got all these various
9 separate pieces that I'm expected to put together to make a
10 determination for something that, it seems to me, should be
11 very easy to do, one way or the other.

12 The identification evidence I find is sufficient. I think
13 it's absolutely sufficient that an individual victim and/or
14 their parent identifies them as being reflective in a
15 particular image. But the other two -- the other two
16 components are not so clear to me.

17 I'm not sure just by a series being found on Mr. Curtis'
18 computer, if that's enough to establish that the specific
19 pornographic image of a particular child victim was on his
20 computer. I don't know that they are synonymous.

21 **MS. HEPBURN:** Does Your Honor have issue with the
22 description of the sexual content of the images that is
23 provided by the points of contact?

24 **THE COURT:** I don't think I have such descriptions
25 for every single one of them.

1 **MS. HEPBURN:** Well, maybe that goes with the filing
2 issue that Your Honor alluded to at the beginning, and maybe,
3 you know --

4 **THE COURT:** I want something much simpler than this.
5 There's a couple of things going on.

6 Mr. Balogh raises a lot of issues about the time crunch.
7 First of all, I don't find Rule 37 has been violated by their
8 disclosure. It's if a party fails to disclose. They didn't
9 fail to disclose it. They disclosed it within the discovery
10 cutoff period. I'm certainly concerned about both sides
11 having an adequate amount of time to prove their case before
12 trial.

13 Moreover, Summary Judgment is used, at least by me, to
14 test the case before a case is put before a jury. And,
15 frankly, I couldn't even begin to tell you how a case like
16 this is to be put before a jury when the evidence itself is
17 contraband.

18 You say this is the first case that's gotten this far, so
19 I guess that's probably why I couldn't find any jury
20 instruction on it this morning when I looked.

21 **MR. KAWAI:** That's why we needed the best judge.

22 **THE COURT:** But the bottom line is, I don't know how
23 this case gets put before a jury. But I do know that I need
24 to be assured one way or the other about what the facts of the
25 case are. And I'm not exactly sure what they are.

1 And I think that what I want is, what I want to know is,
2 assuming the accuracy of the IM, assuming I am going to credit
3 the accuracy of the identification, I'm not satisfied with
4 just the identification of a series on Mr. Curtis' computer.

5 I want to know that an image of the people who have been
6 identified by themselves or their parents is -- was on Mr. --
7 is/was on Mr. Curtis' computer. The fact that it's part of a
8 series is useful information but is not dispositive.

9 **MS. HEPBURN:** We are not relying on that, Your Honor.

10 **THE COURT:** Well, then you are not making it clear to
11 me. I want a chart that tells me -- if it's already in the
12 evidence, that's fine. I want a chart that tells me this -- I
13 think I have it with regard to the identity issue.

14 With regard to whether or not it's on the computer, on
15 Mr. Curtis' computer, you need to point me to specifically
16 what docket entry, what document tells me where I can find
17 evidence that it is -- that a particular image, not a series,
18 but an image is on the computer. And then with regard to
19 whether or not the images are pornographic, you have -- your
20 chart has a description of it for everyone except Erika, Tori,
21 and I don't know, Sally?

22 **MS. HEPBURN:** Jessica.

23 **THE COURT:** Jessica.

24 **MS. HEPBURN:** Yes.

25 **THE COURT:** You have someone else's determination

1 that it fits the definition?

2 **MS. HEPBURN:** No.

3 **THE COURT:** What do you have? What do you have?

4 **MS. HEPBURN:** Your Honor, in the declarations of the
5 POC -- may I step away and get the declarations so I can read
6 one or two of them?

7 (Pause in the proceedings.)

8 **MS. HEPBURN:** For instance, for Maureen. The
9 declaration of Thomas Rothrock, who is the point of contact
10 who was on the team that rescued her as a child -- and I
11 apologize for not having the docket entry on that.

12 He gives, in paragraph 7, her name and date of birth. He
13 talks on Paragraph 11, the photo attached hereto is Exhibit 1
14 is a photo of Maureen taken during the sexual abuse she
15 endured as a child. The unredacted photo shows an erect male
16 penis in her mouth and she is apparently giving fellatio to
17 the adult male.

18 **THE COURT:** And Rothrock is the officer who
19 investigated the underlying crime.

20 **MS. HEPBURN:** The production case, yes, Your Honor.

21 **THE COURT:** And, and we know that this particular
22 image is on Mr. Curtis' computer how?

23 **MS. HEPBURN:** From Agent Popper who gave all of the
24 images to Retired Agent Laws and Agent Barfuss who is a
25 supervisor for Agent Popper who gave the redacted images to

1 Laws.

2 And so for this link, yes, this is where we need to be
3 able to have Agent Popper bring the contraband to court and
4 establish this for Your Honor.

5 **THE COURT:** Yes, you do.

6 **MS. HEPBURN:** Yes.

7 **THE COURT:** Where is he? Where is he located?

8 **MS. HEPBURN:** San Francisco.

9 **THE COURT:** All right. I want him to bring one
10 image -- whichever one you've referred to in -- I guess it's
11 in your chart that's in the reply brief?

12 **MS. HEPBURN:** Yes.

13 **THE COURT:** I want to see one image taken from
14 Mr. Curtis' computer of each of the 15 women.

15 **MS. HEPBURN:** All right.

16 **THE COURT:** Unredacted.

17 **MS. HEPBURN:** Yes.

18 **THE COURT:** And if they -- I am assuming they will
19 match -- see, you haven't -- I don't know how you've
20 identified these. You haven't identified them by -- I don't
21 know how you have identified them in your papers. I mean,
22 some of these are identified by the declaration of Laws, but
23 he just lists the series in the declaration paragraph 11.

24 **MS. HEPBURN:** We attached the redacted images to the
25 declarations of either the child -- excuse me, plaintiff

1 themselves, the parent, or the point of contact, Your Honor.
2 Beyond that, we didn't put a number on them or anything.
3 That's true. They do have file names which correlate with the
4 National Center for Missing and Exploited Children Report, the
5 Child Identification Report which were also correlated by
6 Retired Agent Laws and the ones that he could identify.

7 **THE COURT:** Okay. Ones that you've chosen to rely on
8 in your briefing --

9 **MS. HEPBURN:** Yes.

10 **THE COURT:** -- the ones I want to see.

11 **MS. HEPBURN:** Do you --

12 **THE COURT:** I will determine if they are sufficient
13 or not.

14 **MS. HEPBURN:** Okay.

15 **THE COURT:** And if not, then your motion is not going
16 to be granted, at least as to the ones that you cannot
17 establish that they are, indeed, pornographic images.

18 **MS. HEPBURN:** Okay.

19 **THE COURT:** So prepare another chart and identify it
20 in some way so I have a number to compare it with. And tell
21 the -- Agent Popper?

22 **MS. HEPBURN:** Yes.

23 **THE COURT:** He's with?

24 **MS. HEPBURN:** HSI.

25 **THE COURT:** HSI to contact Ms. Collins, my courtroom

1 deputy, to set up a time when I will be in my chambers and he
2 can -- I'll do an in-camera review.

3 **MS. HEPBURN:** Okay. Will do.

4 **MR. BALOGH:** May I be heard on that issue, Your
5 Honor?

6 **THE COURT:** Yes. I have to leave in four minutes, so
7 make it quick.

8 **MR. BALOGH:** I guess we won't touch on my motion, but
9 I want to object to the notion of ex parte conduct with an
10 agent outside the presence of counsel where the Court will do
11 a review based on hearsay from an agent if I'm not there.

12 I would like to object that this was the time for summary
13 judgment, and based on the Court's statements, plaintiffs have
14 failed in their burden. And based on their failure of burden,
15 Mr. Curtis is entitled to a trial on those -- on both those
16 things.

17 And the third objection I continue to make, as I made in
18 my reply declaration paragraph 7, I still do not have an
19 actual copy of the unredacted filing, and you cited as 139 and
20 139-4. I've had a conversation with Deb Bianco, I've written
21 to Mr. Kawai, I've written to Ms. Hepburn, I've put it in a
22 declaration, and I am here arguing against a motion that is
23 not only not decided, I don't possess the actual complete
24 motion, proof of service, and these are all improper bases,
25 and those are my objections.

1 I ask that the motion be denied.

2 **THE COURT:** Okay.

3 **MR. KAWAI:** That was Dropboxed. I'm sorry, Counsel.

4 **THE COURT:** The matter is submitted. I'm not sure
5 what I will do with this case. Your motion, I'm not ruling on
6 it one way or the other right now.

7 What did you have to say, Mr. Kawai?

8 **MR. KAWAI:** Oh, no, simply that I Dropboxed it. If
9 he wants me to upload a proof of service for that, I can do
10 that.

11 **MR. BALOGH:** What I put in my declaration was,
12 Dropbox is some internal form for your office because it
13 doesn't have all the other information. There's things
14 missing from it. That's what I wrote you about, that's what I
15 talked to Ms. Bianco about, and that's what I wrote
16 Ms. Hepburn about --

17 **MS. HEPBURN:** No.

18 **MR. BALOGH:** -- which you said you gave me, and I
19 raised my hand --

20 **THE COURT:** You guys -- you guys can talk about this
21 on your own time.

22 All I have is what's on the docket. I don't have
23 anything -- there's only a redacted version on the docket. I
24 don't have an unredacted version of anything.

25 **MR. KAWAI:** Your Honor, I don't know what happens

1 when you file an administrative motion to seal, but the
2 unredacted version was a single document. The reason I did
3 that is because it had to be -- the unredacted version had to
4 be filed as an exhibit as to the Motion to Seal.

5 So if there is an issue, I can email that to the -- email
6 that to the Court. I assumed that when you upload it with
7 your motion, that even though it's not publicly accessible,
8 that Your Honor would have access to it. And I apologize if
9 that's not the case.

10 **THE COURT:** Okay. All right. Like I said, I have to
11 adjourn at 3:00 o'clock --

12 (Simultaneous colloquy.)

13 **THE COURT:** Your objections are noted, Mr. Balogh.
14 I'm not sure what I'm going to do with this motion, but I do
15 need to be able to see that the elements have been met. And
16 I'm not sure if it's just the way that everything has been
17 filed, but I also know that I need to see the unredacted or
18 un-sanitized versions of these things in order to be able to
19 make a decision.

20 I understand they are contraband and there are all these
21 rules about who gets to see them. I know they are shown to
22 judges all the time when we are on criminal cases, and we do
23 see them on an ex parte basis, Mr. Balogh. Neither attorney
24 are permitted to -- when I look at them, I don't have a
25 conversation with the agent. I simply just look at the images

1 and I don't have either attorney there present with me, at
2 least not in recent years. I did at the very beginning, but
3 in recent years I don't.

4 In any event, I will let you know what I'm going to do.
5 With regard to the trial date, we have a trial date in June.
6 I'll just tell you, our Court is continuing to kick down the
7 road jury trials because of the numbers, although they are
8 trending in the right direction, but because this is a civil
9 case, it will not be given priority.

10 We are doing one trial at a time per division, and it is
11 not likely that this case will go in June for trial just
12 because we are going to be doing criminal trials before we do
13 civil trials. So I'm not sure when I will be able to let you
14 know. I will let you know before you start your pretrial
15 preparations so that you don't spend time on that needlessly.

16 Kelly, can you tell me when the Pretrial Conference date
17 for this case is?

18 **THE CLERK:** May 27th.

19 **THE COURT:** Okay. So I would certainly -- I'll be
20 back in touch with you guys sometime in March probably after I
21 look at this review and give a little more thought about how I
22 would like to resolve this case.

23 **MR. KAWAI:** Thank you, Your Honor.

24 In the meantime, I will email the unredacted version of
25 the Motion for Summary Judgment but that does not include the

unredacted imagery which is the contraband that we are addressing with the subpoena.

THE COURT: Right. I have the unredacted version that has yellow highlighting on it.

MR. KAWAI: Okay. Okay.

THE COURT: The Summary Judgment Motions, I have those. But anyway, anyway I've got to adjourn now.

MR. KAWAI: Thank you.

THE COURT: Matter is submitted. I will be in touch about what the next step will be.

MS. HEPBURN: Thank you so much.

MR. BALOGH: Thank you.

(Proceedings concluded at 3:02 p.m.)

CERTIFICATE OF REPORTER

I, Diane E. Skillman, Official Reporter for the
United States Court, Northern District of California, hereby
certify that the foregoing is a correct transcript from the
record of proceedings in the above-entitled matter.

Diane E. Skilbeck

DIANE E. SKILLMAN, CSR 4909, RPR, FCRR

Tuesday, March 16, 2021